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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

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M. SHAW

BY: _____

IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA,

V1300CR201080049

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

STATE'S MEMORANDUM RE:
THE ISSUE OF WHETHER THE STATE
MUST ESTABLISH DEFENDANT
BREACHED A DUTY

(The Honorable Warren Darrow)

The State of Arizona hereby submits its memorandum regarding the issues of whether the State must prove defendant owed a duty to the victims, and if so, the duties owed by defendant. For the reasons discussed in the following Memorandum of Points and Authorities, the State need not prove defendant owed a duty to the defendants, although the State may offer such proof in the alternative.

MEMORANDUM OF POINTS AND AUTHORITIES

I. No Breach of Duty is Required to Establish Defendant is Guilty of Manslaughter

A.R.S. §13-201 establishes the minimum requirements for a criminal conviction. Specifically, in order to be guilty of an offense, a person must either: 1) perform conduct which includes a voluntary act, or 2) omit to perform a duty imposed by law which the person is physically capable of performing.¹ A.R.S. §13-201. Conduct is defined as an act or an omission and its

¹ In cases involving the criminal prosecution of a corporation, which this case does not involve, A.R.S. §13-201 is supplanted by A.R.S. § 13-305, which can require proof the corporation failed to discharge a specific duty imposed by law.

1 accompanying culpable mental state. A.R.S. §13-105(6).

2 A person is criminally liable for conduct constituting an offense which the person performs
3 (or causes to be performed) in the name of or on behalf of a corporation, to the same extent as if such
4 conduct were performed in the person's own name. A.R.S. §13-306. See 1 Rudolf J. Gerber,
5 Criminal Law of Arizona, §§ 13-305 & 13-306 (1978) (explaining that A.R.S. §13-306 treats "the
6 agent's crime on behalf of an enterprise just as though the agent had committed the crime on his own
7 behalf. Agents cannot hide behind the 'corporate veil' to escape responsibility. This section thus
8 parallels the usual agency rule on an agent's responsibility for unlawful acts performed on behalf of
9 a principle.").

10 In the case at bar, the State alleged defendant recklessly engaged in conduct that led to the
11 deaths of the three victims. In *State v. Valenzuela*, 194 Ariz. 404, 984 P.2d 12 (1999), the Arizona
12 Supreme Court opined that the crime of reckless manslaughter involves being aware of a substantial
13 and unjustifiable risk that one's conduct will cause another's death and consciously disregarding that
14 risk. Valenzuela involved a situation where an intoxicated defendant shot the victim with a firearm
15 after the victim taunted the defendant to shoot. Clearly the prosecution in Valenzuela was centered
16 upon defendant's affirmative conduct (shooting another person), and the opinion in Valenzuela did
17 not discuss, much less require that the State prove defendant owed a duty to his victim or that
18 defendant violated any duty. *Id.*

19 In another reckless manslaughter prosecution, a defendant was prosecuted after driving
20 heavily intoxicated at night, and killing the victim after deliberately running a stop sign. *State v.*
21 *Jansing*, 186 Ariz. 63, 66, 918 P.2d 1081, 1084 (App. 1996) *overruled on other grounds*, *State v.*
22 *Bass*, 198 Ariz. 571, 12 P.3d 796 (2000). The *Jansing* opinion is silent on the issue of duty
23 because the State's case was premised on proving defendant committed a reckless act, and not
24 that defendant breached some sort of duty to the victim. *Jansing* held the jury could convict
25 defendant of manslaughter only if it found that her recklessness was both an actual cause (or
26 "cause-in-fact") and a proximate cause of the victim's death. *Id.*

1 In another reckless manslaughter case, a defendant pled guilty to reckless manslaughter for
2 supplying drugs and alcohol to the minor driver of a vehicle who later died in a single vehicle
3 accident. *State v. Marty*, 166 Ariz. 233, 801 P.2d 468 (1990). The defendant later challenged the
4 factual basis of his guilty plea to manslaughter, allowing the Court of Appeals to examine the legal
5 and factual basis necessary for a manslaughter conviction. *Id.* The Court of Appeals did not discuss
6 any requirement that the State establish the defendant owed a duty, or breached a duty. *Id.* Instead,
7 the Court of Appeals focused on the conduct of the defendant, and determined he had acted
8 recklessly. *Id.*

9 Likewise, prosecutions for other crimes involving a reckless *mens rea* (including criminal
10 damage, child abuse, and disorderly conduct with a firearm), typically involve situations where the
11 State establishes reckless conduct on the part of the defendant, rather than a defendant's failure to
12 perform a duty. In connection with a criminal damage prosecution of a juvenile, the Arizona Court
13 of appeals recognized that the prosecution may be based upon reckless conduct:

14 The culpable mental state of recklessness is applied either in connection with a
15 result of an act or omission or in connection with enumerated circumstances,
16 whichever may be encompassed in the particular criminal statute at issue. To
17 conclude that an action was recklessly performed requires a showing: that a person
18 is aware of and consciously disregards a substantial and unjustifiable risk that the
19 result will occur or that the circumstance exists. The risk must be of such nature
20 and degree that disregard of such risk constitutes a gross deviation from the
21 standard of conduct that a reasonable person would observe in the situation.

22 *In re William G.*, 192 Ariz. 208, 963 P.2d 287 (1997).

23 In the case at bar, defendant's criminal liability arose from his own voluntary actions,
24 including his actions surrounding the operation of the sweat lodge.

25 II. Defendant Breached Certain Duties

26 Although A.R.S. §13-201 permits the State to establish defendant's criminal liability on the
basis of his affirmative conduct, the State may also establish liability based on defendant's omission
to perform one or more duties. *See* A.R.S. §13-201. The duties defendant failed to comply with

1 include: 1) the statutory duty created by A.R.S. §13-1103, to not commit criminal recklessness, and
2 2) common law duties towards the victims.

3 1. *Defendant had a statutory duty to not commit criminal recklessness*

4 Defendant had a statutory duty to not commit criminal recklessness. A.R.S. §13-105(10)(c)
5 provides that, “[r]ecklessly” means, with respect to a result or to a circumstance described by a
6 statute defining an offense, that a person is aware of and consciously disregards a substantial and
7 unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of
8 such nature and degree that disregard of such risk constitutes a gross deviation from the standard
9 of conduct that a reasonable person would observe in the situation. A person who creates such a
10 risk but who is unaware of such risk solely by reason of voluntary intoxication also acts
11 recklessly with respect to such risk. A.R.S. §13-1103 provides that a person commits
12 manslaughter by recklessly causing the death of another person. These Arizona statutes imposed
13 upon defendant a duty to not act recklessly.
14

15 2. *Defendant owed certain common law duties to the victims*

16 Although Arizona has abolished common law offenses, a defendant’s violation of a common
17 law duty may give rise to criminal liability under the negligent homicide or manslaughter statutes.
18 *State v. Brown*, 129 Ariz. 347, 631 P.2d 129 (App. 1981); *accord State v. Far West*, 224 Ariz. 173,
19 228 P.3d 909 (App. 2010). In *Brown*, a defendant who ran a boarding home was charged with
20 manslaughter and negligent homicide after neglecting to provide adequate care to an infirm boarder,
21 and after continuing to house the boarder in violation of a court’s order to cease providing care and
22 boarding to the boarder. *Brown* recognized that criminal liability could arise based on duties
23 recognized by the Restatement (Second) of Torts, and a portion of the jury instruction defining the
24 duty was taken directly from the Restatement. *Id.* at 350, 631 P.2d 129, 132.
25
26

1 Among other duties, defendant also failed to perform the following common law duties:

2 a. Regarding Liz Neuman, defendant had a duty to furnish Neuman with a safe
3 workplace. *Smith v. Gordon*, 6 Ariz.App. 168, 172, 430 P.2d 922, 926 (1967); and see A.R.S.
4 §13-306. For purposes of determining defendant's duty towards Neuman, Neuman is deemed a
5 'gratuitous employee' and not a volunteer. *Bond v. Cartwright Little League, Inc.*, 112 Ariz. 9,
6 14, 536 P.2d 697, 702 (1975). *Bond* set forth a two-part test to determine if a volunteer should be
7 treated as an employee: "The two key elements for the determination of whether a gratuitous
8 undertaking is part of the master-servant relationship are whether the actor has submitted himself
9 to the directions and control of the one for whom the service is done and whether the primary
10 purpose underlying the act was to serve another. *Id.*

12 b. Regarding Liz Neuman, Kirby Brown, and James Shore, a business proprietor has
13 a duty to make the premises reasonably safe for use by invitees. *Chiara v. Fry's Food Stores of*
14 *Arizona, Inc.*, 152 Ariz. 398, 399, 733 P.2d 283, 284 (1987). The proprietor may be liable for a
15 dangerous condition produced by a third party, though, if he had actual or constructive notice of
16 the dangerous condition. *Id.*; and see A.R.S. §13-306.

18 *III. Conclusion*

19 In any criminal prosecution, the State may subject a defendant to criminal liability for: 1) the
20 defendant's own conduct, or 2) the defendant's omission to perform a duty imposed by law. A.R.S.
21 §13-201. Many Arizona criminal cases (involving a defendant's reckless state of mind) were
22 premised upon conduct rather than a breach of a duty. *Valenzuela; Jansing; Marty; In re William G.*

24 In addition to criminal liability for his own conduct, defendant also faces criminal liability for
25 his failure to perform certain duties which he was capable of performing, including a duty to not act
26

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1 in a criminally reckless manner, a duty to provide Neuman with a safe workplace, and a duty to
2 make the sweat lodge premises reasonably safe for use by the three victims.

3 Respectfully submitted this 21st day March, 2011.

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6
7
8 By


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11
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